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Before the  
**Federal Communications Commission**  
 Washington, DC

FEDERAL COMMUNICATIONS COMMISSION  
 OFFICE OF THE SECRETARY

In the Matter of )

Implementation of Section 309(j)  
 of the Communications Act  
 -- Competitive Bidding for Commercial  
 Broadcast and Instructional Television Fixed  
 Service Licenses )

MM Docket No. 97-234

Reexamination of the Policy  
 Statement on Comparative  
 Broadcast Hearings )

GC Docket No. 92-52

Proposals to Reform the Commission's  
 Comparative Hearing Process to  
 Expedite the Resolution of Cases )

GEN Docket No. 90-264

To: The Commission

**PETITION FOR RECONSIDERATION**

KERM, Inc. ("KERM"), by its attorney, hereby submits its Petition for Reconsideration of the *First Report and Order*, FCC 98-194, released in this proceeding on August 18, 1998. With respect thereto, the following is stated:

**Background**

1. As KERM indicated in its Comments filed previously in this proceeding, KERM is a small business, which owns and operates AM stations KURM in Rogers, Arkansas and KARV in Russellville, Arkansas. Its President is Kermit Womack, a veteran broadcaster with more than 30 years of experience in the industry. Station KURM has been in continual operation since 1979, while KARV has operated for more than 25 years. Due to its position as an AM operator with a long term history of providing quality broadcasting to its communities of license, KERM is well situated to provide input in this matter.

2. KERM's sole dispute with the manner in which the FCC exercised its discretion in establishing new rules governing the award of new licenses has to do with the policy concerning the award of "bidding credits" to new entrants. KERM believes that this policy, as it currently exists, will encourage abuse of the Commission's processes, and is not narrowly targeted to accomplish the purposes which it seeks to address.

### **Argument**

3. The new Rules currently read as follows:

#### **§ 73.5007 Designated entity provisions.**

(a) *New entrant bidding credit.* A winning bidder that qualifies as a "new entrant" may use a bidding credit to lower the cost of its winning bid on any broadcast construction permit. A thirty-five (35) percent bidding credit will be given to a winning bidder if it and/or its owners have no recognizable interest (more than fifty (50) percent or *de facto* control) in the aggregate, in any other media of mass communications. A twenty-five (25) percent bidding credit will be given to a winning bidder if it and/or its owners, in the aggregate, have a recognizable interest in no more than three mass media facilities. No bidding credit will be given if any of the commonly owned mass media facilities serves the same area as the proposed broadcast station, or if the winning bidder and/or its owners have recognizable interests in more than three mass media facilities.

(1) The new entrant bidding credit is not available to applicants that control, or whose owners control, in the aggregate, more than fifty (50) percent of any other media of mass communications in the same area as the proposed broadcast facility. The facilities will be considered in the "same area" if the following defined areas wholly encompass, or are encompassed by, the proposed broadcast or secondary broadcast facility's relevant contour:

(i) AM broadcast station--predicted or measured 2mV/m groundwave contour (*see* 47 C.F.R. §§ 73.183 or 73.186);

(ii) FM broadcast or FM translator station--predicted 1.0 mV/m contour (*see* 47 C.F.R. § 73.313);

(iii) Television broadcast station--Grade A contour (*see* 47 C.F.R. § 73.684);

(iv) Low power television or television translator station--the predicted, protected contour (*see* 47 C.F.R. § 74.707(a));

(v) Cable television system--the franchised community of a cable system;

(vi) Daily newspaper--community of publication; and

(vii) Multipoint Distribution Service station—protected service area (see 47 C.F.R. §§ 21.902(d) or 21.933).

(2) *Unjust enrichment.* If a licensee or permittee that utilizes a new entrant bidding credit under this subsection seeks to assign or transfer control of its license or construction permit to an entity not meeting the eligibility criteria for the bidding credit, the licensee or permittee must reimburse the U.S. Government for the amount of the bidding credit, plus interest based on the rate for ten-year U.S. Treasury obligations applicable on the date the construction permit was originally granted, as a condition of Commission approval of the assignment or transfer. If a licensee or permittee that utilizes a new entrant bidding credit seeks to assign or transfer control of a license or construction permit to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest based on the rate for ten-year U.S. Treasury obligations applicable on the date the construction permit was originally granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer. The amount of the reimbursement payments will be reduced over time. An assignment or transfer in the first two years after issuance of the construction permit to the winning bidder will result in a forfeiture of one hundred (100) percent of the value of the bidding credit; during year three, of seventy-five (75) percent of the value of the bidding credit; in year four, of fifty (50) percent; in year five, twenty-five (25) percent; and thereafter, no payment. If a licensee or permittee who utilized a new entrant bidding credit in obtaining a broadcast license or construction permit acquires within this five-year reimbursement period an additional broadcast facility or facilities, such that the licensee or permittee would not have been eligible for the new entrant credit, the licensee or permittee will not be required to reimburse the U.S. Government for the amount of the bidding credit.

47 C.F.R. § 73.5007.

4. There are a host of problems that will be created by utilization of this new Rule. First, although facially attractive, the provision in its present form will not serve the class of persons that it seeks to serve. Section 309(j) of the Communications Act provides that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). To achieve this congressional goal, the statute directs the Commission to "consider the use of... bidding preferences, and other procedures." *Id.* In addition, Section 309(j)(3)(B) instructs the Commission, in establishing eligibility criteria and bidding methodologies, to promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of

applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women," which are collectively referred to as "designated entities." 47 U.S.C. § 309(j)(3)(B). In this respect, *conceptually*, the idea of providing credits to true "new entrants" is laudatory, and is a concept to which KERM has no objection.

5. However, the "bidding credit" provisions, as currently drafted, are defective, insofar as they will not, in fact, be limited to *new* entrants, but will also be available *also* to existing or former owners that may simply have manipulated their ownership interests in a way so that they do not own any mass media interests at the time the short-form application is filed, whether they have owned mass media interests in the market in the past or not. Moreover, it remains freely available to members of current owners' immediate family members, who will be free to establish joint operations, again, at the expense of diversity.

6. Specifically, what already is happening that *existing station owners* are relinquishing themselves of ownership of their existing broadcast stations, presumably in anticipation of the auction. This will allow such owners to take advantage of the 35% bidding credit. In cases where such a licensee can simply "park" the ownership of the station with a friendly party, such as a relative, the potential for abuse becomes even worse. Under the Commission's new rules, a party would be permitted to *reacquire* the station formerly owned after the auction is concluded, without penalty. As the Rules state:

If a licensee or permittee who utilized a new entrant bidding credit in obtaining a broadcast license or construction permit acquires within this five-year reimbursement period an additional broadcast facility or facilities, such that the licensee or permittee would not have been eligible for the new entrant credit, the licensee or permittee will not be required to reimburse the U.S. Government for the amount of the bidding credit.

47 C.F.R. § 73.5007(a)(2).

7. An example of where this apparently is happening is Bentonville, Arkansas. One applicant, JEM Broadcasting Company, Inc., filed an application (File No. BPH-931008MA) for a new FM broadcast station to serve Bentonville, Arkansas. The application is owned 100% by Elvis Moody, who also owns Station KESE(AM), Bentonville-Bella Vista, Arkansas. Under the newly adopted auction rules, JEM would not be entitled to a "bidding credit" since JEM's principal, owns a station in the same area.

8. Recent actions taken by Moody illustrate the anomalous result the new rules will allow. In 1978 JEM acquired the construction permit for KESE(AM). In 1979, he placed it on the air, and has operated that station since that time. In August 1998, the Commission released its new rules. On September 15, 1998, JEM filed an application for assignment of Station KESE(AM), for assignment of Station KESE(AM) to his sister, which, if approved and consummated, will ostensibly entitle JEM to qualify as a "new entrant" to the market under the Commission's rules, and thereby ostensibly entitle JEM to a 35% bidding credit.

9. That credit would be awarded under the present rules despite the fact that the result is far outside the rationale given by the Commission for establishing a "bidding credit" program, namely, as the name implies, to encourage the entry literally of new entrants into the marketplace. Moody clearly is not a "new" entrant. As his application reflects, he has been an owner in the market since 1979. Moreover, even after the station is sold, nothing in the Commission's Rules would prohibit Moody from "assisting" his sister in the station's operations, or from serving even as General Manager of Station KESE(AM). As the rules currently are written, Moody still would be entitled to the 35% bidding credit, simply because he does not "own or control" the existing station, as those terms are defined in the Commission's Rules. Finally, were he to prevail in the

auction by virtue of the award of the bidding credit, nothing would prohibit him from either (1) entering into a Local Marketing Agreement with his "former" station which would allow him to provide programming on the totality of the Station's schedule, or even (2) buying his former station back outright. Either result would be legal under the Commission's current Rules, and would not require any "payback" of the bidding credit that was awarded.

10. Similar possible abuse is occurring with respect to the other two applicants in the proceeding. In the application of Kimberly Hope Hendron (File No. BPH-931012MC), the applicant's sister, Gayla Joy Hendron, is licensee of Station KBVA(FM), licensed to nearby Bella Vista, Arkansas. The station operates out of the used car dealership of their father, group station owner Kim D. Hendron. In the application of Cherokee Broadcasting Co. (File No. BPH-931012UB), the principals are the children and former employees of longtime local operator Dewey Johnson. As in the case of Moody, that stations owned by Johnson Communications, Inc. (Station KCJC, KWKK, and KCAB) also were just recently sold, in August 1998 and, at the time of application, Johnson also owned KAMO AM/FM at Rogers, Arkansas, in a neighboring community. In each case, the participants to the application (who also will be the participants in the upcoming auction) are not true "new entrants" to the market, and due to the pre-existing family relationships, a question necessarily exists concerning the degree of independence that has existed in the past and can be expected to exist in the future.

11. The abuse of the Rules that will be permitted is manifest. First of all, from a public interest standpoint, diversity is not furthered. Second of all, such an applicant receives an unfair advantage over the other bidding participants. Allowing licensees to play a "shell game" where they potentially can ostensibly "sell" their existing interest to a friendly party -- even a close

relative -- and thereby receive a bidding credit, will simply encourage and perpetuate abuse of the bidding credit program.

12. The potential for abuse is exacerbated by another element of the Commission new Rules. The Rules, as adopted, appear to abandon, in part, the definitions of what constitute "ownership" adopted in the Commission's past proceedings. In the past, the Commission's Attribution Rules have established what constitutes a "cognizable" interest. See 47 C.F.R. § 73.3555. In general, a "cognizable interest" in a licensee has been defined as an stock ownership interest of 5% or more, a general partnership interest, or ownership of 10% or more of an investment company of an entity owning a broadcast interest. Holders of non-voting stock or a qualified limited partnership interest do not hold a "cognizable interest." 47 C.F.R. § 73.3555, Note 2. Moreover, under Section 73.3555(a)(3)(i):

(3)(i) Where the principal community contours of two radio stations overlap and a party (including all parties under common control) with an attributable ownership interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraph (a)(1) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

47 C.F.R. § 73.3555(a)(3)(i).

13. These definitions have been replaced with the term "recognizable interest" in the new Rules. See 47 C.F.R. § 73.5007(a). Thus, read literally, the Rules adopted under the *Report and Order* no longer will apply the Commission's past criteria for what constitutes "ownership," and instead replaces it with a new, undefined term called "recognizable interest." Specifically, while the new Rules provide that a thirty-five percent bidding credit will be given to a winning bidder if it and/or its owners "have no recognizable interest" (more than fifty (50) percent or *de facto*

control) in the aggregate, in any other media of mass communications. A twenty-five (25) percent bidding credit will be given to a winning bidder if it and/or its owners, in the aggregate, "have a recognizable interest" in no more than three mass media facilities. No bidding credit will be given if any of the commonly owned mass media facilities serves the same area as the proposed broadcast station, or if the winning bidder and/or its owners have "recognizable interests" in more than three mass media facilities. 47 C.F.R. § 47.5007(a).

14. Except in the first instance, no definition of "recognizable interest" is provided in the Rules, at all, and even in the first instance, emphasis is placed only on "control," which is a concept the Commission has recognized is difficult, at times, to pinpoint. Moreover, as the Rules currently read, despite the fact that the Commission has recognized that time brokering is tantamount to ownership for multiple ownership purposes (*Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, ¶¶ 63-65 (1992)), under the Rules as currently written, a party could be the broker of 100% of the time on an existing, within-market broadcast facility at the time of the auction, and still be entitled to be considered a "new entrant" and therefore entitled to receive a 35% bidding credit from the Commission. Here, again, this result would occur is despite the fact that the "entrant" is not "new," and despite the fact that diversity within the market is not, in fact, furthered.

15. There are three solutions to the problems that have been identified above. First, the term "recognizable interests" that trigger the entitlement of bidding credits should be defined, and should be broadened to include the interests previously recognized as "cognizable" in past Commission proceedings. As the Commission already has noted in *Review of the Commission's Regulations Governing Attribution of Broadcast Interests*:



As we have noted, the attribution rules "represent the Commission's judgment regarding what ownership interest in or relation to a licensee will confer on its holder that degree of influence or control over the licensee and its facilities as should subject it to limitation under the multiple ownership rules."

*Id.* at ¶ 4. Most important is that the Commission continue to impute brokerage of time under an LMA Agreement as tantamount to "ownership." Otherwise, licensees will be free to simply place the ownership of stations in the names of friends or relatives on one hand while continuing to obtain all of the financial benefits of station operation through an LMA/Time Brokerage Agreement, but nevertheless qualify for the Commission's bidding credits.

16. Second, the Commission should include the ownership interests of close relatives in determining eligibility for bidding credits except in those instances where independence has been proven. In this respect, the Commission should simply utilize the policy already existing in Section 1.2110 of its general auction rules, which provides as follows:

(A) Spousal affiliation. Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States....

(B) Kinship affiliation. Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, half brother or sister. This presumption may be rebutted by showing that the family members are estranged, the family ties are remote, or the family members are not closely involved with each other in business matters.

Example: A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in a[n]... application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation Y is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

47 C.F.R. § 1.2110(b)(4)(iii). As to the factors that should be examined to determine whether the

presumption should be rebutted, the Commission should continue to utilize the same factors as it has used traditionally, and which were set forth in *Clarification of Commission Policies*

*Regarding Spousal Attribution*, 7 FCC Rcd 1920 (1992). As the Commission stated:

In deciding attribution issues in the context of close family relationships, the Commission has considered the following factors to be relevant:

- (1) Representations that the media interests of close family members will be independent and will not be subject to common influence or control;
- (2) Commingling of ownership or other interests in media businesses;
- (3) Participation by family members in the financial affairs, programming and personnel decisions of each other's media interests;
- (4) Prior broadcast experience of the individual seeking to establish independent interests;
- (5) Financial independence;
- (6) Sharing of personnel, equipment, contractors or information regarding programming;
- (7) Involvement by family members in the acquisition or application process.

In evaluating non-spousal family relationships, we have recognized that family relationships have many characteristics, such as financial and business ties, which in a non-family relationship would be indicia of common ownership or control. We do not, however, attribute interests based solely on these characteristics since they are often part and parcel of the relationship, and attribution would thus create unfair obstacles to media ownership. Similarly, we recognize that spousal relationships possess certain qualities that in other family relationships may indicate common influence or control, but which, if used to justify attribution in a spousal setting, would undermine our efforts in this proceeding. Independence, for example, has been shown where adult children demonstrate emancipation and financial independence from their parents. Spouses, on the other hand, live together and may not have segregated finances. In a spousal setting, however, these attributes are not particularly indicative of a lack of independence; rather they are common characteristics of a marriage relationship. Accordingly, these circumstances alone would not be sufficient to question the assertion of independence in a spousal situation.

*Id.* at ¶¶ 16-17 (footnotes omitted). Adoption of these standards will help eliminate any potential for abuse of the Commission's bidding credit policy which otherwise may exist and be subject to manipulation.

17. Finally, the Commission must limit the ability for station owners to simply relinquish ownership of a station during the term of an auction but to reacquire without penalty the station after the auction proceeding is concluded. Under the present rules, as noted above, a station owner literally could "park" the ownership of a station with another party, "assist" in the operation of the station (*i.e.*, through "management" of the station (or operation of the station outright, through an LMA Agreement)), obtain a bidding credit and win an auction, and then simply reacquire the station after the auction is concluded (through exercise of an option or an oral agreement), without penalty. *See* 47 C.F.R. § 73.5007(b) ("if a licensee or permittee who utilized a new entrant bidding credit...acquires...an additional broadcast facility or facilities...the licensee or permittee will not be required to reimburse the U.S. Government for the amount of the bidding credit"). This ability to acquire additional facilities without jeopardizing entitlement to the bidding credit should be limited either to facilities outside the service area of the facility that has been acquired through the auction, or else to facilities not previously owned by the permittee or its owners. This also will help eliminate the ability for auction participants to manipulate the rules.

18. Failure to adopt these sorts of safeguards will leave the door open to its rules being manipulated in the same sort of manner and its rules were manipulated during the comparative hearing era, *i.e.*, applicants advancing sham proposals to increase station ownership by existing station owners. The Commission must learn from the lessons of the past, and take whatever steps it can to prevent any sort of charades and games to be played with the auction rules and their

preferences. An opportunity exists to ensure that all auction participants can participate fairly, on a level playing field. Station KURM has served its service area faithfully, and has strived to operate competitively in a market that now allows group ownership of as many as six stations. KURM intends to participate in the auction process, and intends to do so in a manner that is straightforward and honest, and that does not result in a manipulation of the Commission's Rules, as they were intended to operate. The Commission must recognize the defects that currently exist in its Rules, and address those defects in a manner that will be fair to all parties and that will be in furtherance of the public interest.

**WHEREFORE**, it is respectfully requested that this Petition for reconsideration be granted, and that the Rules adopted by the Commission in its *First Report and Order* be modified as proposed herein.

Respectfully requested,

**KERM, INC.**

By: 

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*October 13, 1998*

## **CERTIFICATE OF SERVICE**

I, Dan J. Alpert do hereby certify that on October 13, 1998, I sent via first-class mail, a copy of the foregoing document to the following:

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